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16 **UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

17  
18 TAD SCHLATRE, Individually and on Behalf  
19 of All Others Similarly Situated,

20 Plaintiff,

21 v.

22 MARATHON DIGITAL HOLDINGS, INC.  
f/k/a MARATHON PATENT GROUP, INC.,  
23 MERRICK D. OKAMOTO, FREDERICK G.  
THIEL, and SIMEON SALZMAN,

24 Defendants.

25  
26 No.: 2:21-cv-02209-RFB-NJK

27  
28 **MOTION OF TAD SCHLATRE**  
**FOR APPOINTMENT AS LEAD**  
**PLAINTIFF AND APPROVAL OF**  
**COUNSEL**

COMES NOW TAD SCHLATRE (“Schlatre”), by and through his counsel of record,  
and respectfully submits this motion, pursuant to Section 21D(a)(3)(B) of the Securities

MOTION

1 Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78u-4(a)(3)(B), as amended by the  
2 Private Securities Litigation Reform Act of 1995 (the “PSLRA”), for an order: (i) appointing  
3 Schlatre as Lead Plaintiff on behalf of a class consisting of all persons and entities other than  
4 the above-captioned defendants (“Defendants”) that purchased or otherwise acquired Marathon  
5 Digital Holdings, Inc. f/k/a Marathon Patent Group, Inc. (“Marathon” or the “Company”)  
6 securities between October 13, 2020 and November 15, 2021, both dates inclusive (the “Class  
7 Period”) (the “Class”); and (ii) approving of Schlatre’s selection of Pomerantz LLP  
8 (“Pomerantz”) as Lead Counsel and Muehlbauer Law Office, Ltd. (“Muehlbauer Law”) as  
9 Liaison Counsel for the Class.

10  
11 In support of this motion, Schlatre submits a Memorandum of Points and Authorities,  
12 the Declaration of Andrew Muehlbauer (“Muehlbauer Decl.”) submitted herewith, the pleadings  
13 and other filings herein, and such other written and oral arguments as may be presented to the  
14 Court.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## **PRELIMINARY STATEMENT**

The above-captioned action (the “Action”) alleges that, during the Class Period, Defendants defrauded investors in violation of Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b), 78t(a)), and United States (“U.S.”) Securities and Exchange Commission (“SEC”) Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5). Marathon investors, including Schlatre, incurred significant losses following Marathon’s disclosure on November 15, 2021 that the Company and certain of its executives received a subpoena to produce documents and communications concerning a data center facility, and that the SEC may be investigating whether or not there may have been any violations of the federal securities law.

*See* Dkt. No. 1 (the “Complaint”) ¶ 5. Following this disclosure, Marathon’s stock price fell sharply, damaging Schlatre and other investors. *Id.* ¶ 6.

Pursuant to the PSLRA, the Court is to appoint as Lead Plaintiff the movant who possesses the largest financial interest in the outcome of the Action and who satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”). 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Schlatre, having incurred losses of \$38,529 in connection with his Class Period purchases of Marathon securities, believes that he has the largest financial interest in the relief sought in this Action. *See* Muehlbauer Decl., Exhibit (“Ex.”) A.

In addition to asserting the largest financial interest in this litigation, Schlatre also meets the applicable requirements of Rule 23 because his claims are typical of absent Class members and because he will fairly and adequately represent the interests of the Class.

To fulfill his obligations as Lead Plaintiff and vigorously prosecute this Action on behalf of the Class, Schlatre has selected Pomerantz as Lead Counsel for the Class. Pomerantz is

1 highly experienced in the area of securities litigation and class actions and has successfully  
 2 prosecuted numerous securities litigations and securities fraud class actions on behalf of  
 3 investors, as detailed in the firm's resume. Schlatre has also selected the highly respected  
 4 Muehlbauer Law, a firm with significant experience in securities class action matters, with its  
 5 principal offices in this Judicial District, to serve as Liaison Counsel for the Class.  
 6

7 Accordingly, based on Schlatre's significant financial interest and his commitment and  
 8 ability to oversee this litigation, Schlatre respectfully requests that the Court enter an order  
 9 appointing him as Lead Plaintiff and approving his selections of counsel.  
 10

### **STATEMENT OF FACTS**

12 Marathon is a digital asset technology company that mines cryptocurrencies with a focus  
 13 on the blockchain ecosystem and the generation of digital assets in the U.S. Complaint ¶ 2.  
 14 The Company was formerly known as "Marathon Patent Group, Inc." and changed its name to  
 15 "Marathon Digital Holdings, Inc." on March 1, 2021. *Id.*

16 In October 2020, Marathon announced the formation of a new joint venture with  
 17 Beowulf Energy LLC ("Beowulf") purportedly focused on delivering low-cost power to  
 18 Marathon's Bitcoin mining operations (the "Beowulf Joint Venture"). *Id.* ¶ 3. In connection  
 19 with that joint venture, Marathon entered into a series of agreements with multiple parties to  
 20 design and build a data center in Hardin, Montana (the "Hardin Facility"), issuing 6 million  
 21 shares of its common stock to the parties of those agreements. *Id.*

22 Throughout the Class Period, Defendants made materially false and misleading  
 23 statements regarding the Company's business, operations, and compliance policies. *Id.* ¶ 4.  
 24 Specifically, Defendants made false and/or misleading statements and/or failed to disclose that:  
 25 (i) the Beowulf Joint Venture, as it related to the Hardin Facility, implicated potential regulatory  
 26

1 violations, including U.S. securities law violations; (ii) as a result, the Beowulf Joint Venture  
 2 subjected Marathon to a heightened risk of regulatory scrutiny; (iii) the foregoing was  
 3 reasonably likely to have a material negative impact on the Company's business and  
 4 commercial prospects; and (iv) as a result, the Company's public statements were materially  
 5 false and misleading at all relevant times. *Id.*

6  
 7 On November 15, 2021, Marathon disclosed that "the Company and certain of its  
 8 executives received a subpoena to produce documents and communications concerning the  
 9 Hardin, Montana data center facility[,]” and advised that “the SEC may be investigating  
 10 whether or not there may have been any violations of the federal securities law.” *Id.* ¶ 5.

11  
 12 On this news, Marathon’s stock price fell \$20.52 per share, or 27.03%, to close at  
 13 \$55.40 per share on November 15, 2021. *Id.* ¶ 6.

14 As a result of Defendants’ wrongful acts and omissions, and the precipitous decline in  
 15 the market value of the Company’s securities, the plaintiff in the Action and other Class  
 16 members have suffered significant losses and damages. *Id.* ¶ 7.

17  
**ARGUMENT**  
 18

19       **A. SCHLATRE SHOULD BE APPOINTED LEAD PLAINTIFF**

20       Schlatre should be appointed Lead Plaintiff because, to his knowledge, he has the largest  
 21 financial interest in this Action and otherwise satisfies the requirements of Rule 23. The  
 22 PSLRA directs courts to consider any motion to serve as lead plaintiff filed by class members in  
 23 response to a published notice of the class action by the later of (i) 90 days after the date of  
 24 publication, or (ii) as soon as practicable after the Court decides any pending motion to  
 25 consolidate. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i)-(ii).

1           Further, under 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), the Court is directed to consider all  
 2 motions by plaintiffs or purported class members to appoint lead plaintiff filed in response to  
 3 any such notice. Specifically, the Court “shall” appoint “the presumptively most adequate  
 4 plaintiff” to serve as lead plaintiff and shall presume that plaintiff is the person or group of  
 5 persons, that:

- 7           (aa) has either filed the complaint or made a motion in response to a  
               notice . . .;
- 8           (bb) in the determination of the Court, has the largest financial  
               interest in the relief sought by the class; and
- 10           (cc) otherwise satisfies the requirements of Rule 23 of the Federal  
               Rules of Civil Procedure.

12 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

13           As set forth below, Schlatre satisfies all three of these criteria and thus is entitled to the  
 14 presumption that he is the most adequate plaintiff of the Class and, therefore, should be  
 15 appointed Lead Plaintiff for the Class.

17           **1.       Schlatre Is Willing to Serve as Class Representative**

18           On December 17, 2021, Pomerantz, counsel for the plaintiff in the Action, caused a  
 19 notice to be published over *Globe Newswire* pursuant to Section 21D(a)(3)(A)(i) of the PSLRA  
 20 (the “PSLRA Notice”), which announced that this Action had been filed against Defendants,  
 21 and which advised investors in Marathon securities that they had until February 15, 2022—*i.e.*,  
 22 60 days from the date of the PSLRA Notice—to file a motion to be appointed as Lead Plaintiff.  
 23

24 *See* Muehlbauer Decl., Ex. B.

25           Schlatre has filed the instant motion pursuant to the PSLRA Notice, and has attached a  
 26 sworn Certification attesting that he is willing to serve as a representative for the Class, and to  
 27

1 provide testimony at deposition and trial, if necessary. *See id.*, Ex. C. Accordingly, Schlatre  
 2 satisfies the first requirement to serve as Lead Plaintiff of the Class.

3           **2. Schlatre Has the “Largest Financial Interest”**

4           The PSLRA requires a court to adopt a presumption that “the most adequate plaintiff . . .  
 5 is the person or group of persons that . . . has the largest financial interest in the relief sought by  
 6 the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii). To the best of Schlatre’s knowledge, he has the  
 7 largest financial interest of any Marathon investor seeking to serve as Lead Plaintiff. For claims  
 8 arising under Section 10(b) of the Exchange Act, courts frequently assess financial interest  
 9 based upon the four factors articulated in the seminal case *Lax v. First Merchants Acceptance*  
 10 *Corp.*: (1) the number of shares purchased during the class period; (2) the number of net shares  
 11 purchased during the class period; (3) the total net funds expended during the class period; and  
 12 (4) the approximate losses suffered. Nos. 97 C 2715 *et seq.*, 1997 U.S. Dist. LEXIS 11866, at  
 13 \*17 (N.D. Ill. Aug. 6, 1997); *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 262 (3d Cir.  
 14 2001) (adopting test set forth in *Lax*).<sup>1</sup> Courts in the Ninth Circuit have expressly assessed  
 15 financial interest with reference to the *Lax* factors. *See, e.g., Robb v. Fitbit Inc.*, No. 16-cv-  
 16 00151-SI, 2016 U.S. Dist. LEXIS 62457, at \*8 (N.D. Cal. May 10, 2016); *Knox v. Yingli Green*  
 17 *Energy Holding Co.*, 136 F. Supp. 3d 1159, 1163 (C.D. Cal. Oct. 6, 2015).

18           During the Class Period, Schlatre: (1) purchased 3,188 shares of Marathon securities; (2)  
 19 expended \$171,151 on his purchases of Marathon securities; (3) retained 1,002 of his shares of  
 20 Marathon securities; and (4) as a result of the disclosures of the fraud, suffered losses of  
 21 \$38,529 in connection with his transactions in Marathon securities during the Class Period. *See*

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 27           <sup>1</sup> *See also In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295 (E.D.N.Y. 1998); *accord In re Comverse Tech., Inc., Sec. Litig.*, No. 06-CV-1825 (NGG) (RER), 2007 U.S. Dist. LEXIS 14878, at \*22-\*25 (E.D.N.Y. Mar. 2, 2007) (collectively, the “Lax-Olsten” factors).

1 Muehlbauer Decl., Ex. A. To the extent that Schlatre possesses the largest financial interest in  
 2 the outcome of this litigation, he is the presumptive “most adequate” plaintiff. 15 U.S.C. § 78u-  
 3 4(a)(3)(B)(iii)(I)(bb).

4

5       **3. Schlatre Otherwise Satisfies the Requirements of Rule 23 of the**  
**Federal Rules of Civil Procedure**

6       The PSLRA further provides that, in addition to possessing the largest financial interest  
 7 in the outcome of the litigation, the Lead Plaintiff must “otherwise satisfy the requirements of  
 8 Rule 23 of the Federal Rules of Civil Procedure.”

9

10      In making its determination that a Lead Plaintiff satisfies the requirements of Rule 23,  
 11 the Court need not raise its inquiry to the level required in ruling on a motion for class  
 12 certification. Instead, “[a]t the lead plaintiff selection stage, all that is required is a ‘preliminary  
 13 showing’ that the lead plaintiff’s claims are typical and adequate.” *In re AudioEye, Inc.*, No.  
 14 CV-15-163-TUC-DCB (LEAD), 2015 U.S. Dist. LEXIS 193348, at \*8 (D. Ariz. July 31, 2015)  
 15 (quoting *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 587 (N.D. Cal. 1999)).

16

17      “The test for typicality ‘is whether other members have the same or similar injury,  
 18 whether the action is based on conduct which is not unique to the named plaintiffs, and whether  
 19 other class members have been injured by the same course of conduct.’ The lead plaintiff’s  
 20 claims need not, however, be identical, or even substantially identical, to the claims of the class  
 21 in order to satisfy typicality.” *In re MGM Mirage Secs. Litig.*, No. 2:09-cv-01558-GMN-LRL,  
 22 2010 U.S. Dist. LEXIS 120061, at \*8 (D. Nev. Oct. 25, 2010) (internal citations omitted)  
 23 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

24

25      The claims of Schlatre are typical of those of the Class. Schlatre alleges, as do all Class  
 26 members, that Defendants violated the Exchange Act by making what they knew or should have  
 27 known were false or misleading statements of material facts concerning Marathon, or by

omitting material facts necessary to make the statements they did make not misleading. Schlatre, like all Class members, purchased Marathon securities during the Class Period at prices artificially inflated by Defendants' misrepresentations or omissions, was damaged upon the disclosure of those misrepresentations or omissions that drove Marathon's share price downward. These shared claims, which are based on the same legal theory and arise from the same events and course of conduct as the Class's claims, satisfy the typicality requirement of Rule 23(a)(3).

"The test for adequacy is: '(1) whether the interests of the class representatives coincide with those of the class, and (2) whether the class representative has the ability to prosecute the action vigorously.'" *MGM*, 2010 U.S. Dist. LEXIS 120061, at \*8 (quoting *Stocke v. Shuffle Master, Inc.*, No. 2:07-CV-00715-KJD-RJJ, 2007 U.S. Dist. LEXIS 91535, at \*3 (D. Nev. Nov. 30, 2007)). Schlatre is an adequate representative for the Class. Schlatre is aware of no antagonism between his interests and those of the Class, and his losses demonstrate that he has a sufficient interest in the outcome of this litigation to ensure his vigorous prosecution of the Action.

Further demonstrating his adequacy, Schlatre has submitted a Declaration attesting to, *inter alia*, his background, his investing experience, his understanding of the responsibilities of a Lead Plaintiff pursuant to the PSLRA, his decision to seek appointment as Lead Plaintiff, and the steps that he is prepared to take to prosecute this litigation on behalf of the Class. See Muehlbauer Decl., Ex. D.

Finally, as set forth in greater detail below, Schlatre has retained counsel highly experienced in vigorously and efficiently prosecuting securities class actions such as this Action, and submits his choices of Pomerantz and Muehlbauer Law to the Court for approval as

1 Lead Counsel and Liaison Counsel, respectively, for the Class pursuant to 15 U.S.C.  
2 § 78u-4(a)(3)(B)(v).

3           **4. Schlatre Will Fairly and Adequately Represent the Interests of the  
4 Class and Is Not Subject to Unique Defenses**

5           The presumption in favor of appointing Schlatre as Lead Plaintiff may be rebutted only  
6 upon proof “by a member of the purported plaintiff class” that the presumptively most adequate  
7 plaintiff:

- 8                   (aa) will not fairly and adequately protect the interests of the class; or  
9                   (bb) is subject to unique defenses that render such plaintiff incapable of  
10                  adequately representing the class.

11               15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

12               The ability and desire of Schlatre to fairly and adequately represent the Class has been  
13 discussed above. Schlatre is not aware of any unique defenses Defendants could raise that  
14 would render him inadequate to represent the Class. Accordingly, Schlatre should be appointed  
15 Lead Plaintiff for the Class.

16           **B. LEAD PLAINTIFF’S SELECTION OF COUNSEL SHOULD BE  
17 APPROVED**

18               The PSLRA vests authority in the Lead Plaintiff to select and retain Lead Counsel,  
19 subject to the approval of the Court. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court should  
20 interfere with Lead Plaintiff’s selection only when necessary to “protect the interests of the  
21 class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa); *see also Curry v. Yelp Inc.*, Nos. 14-cv-03547-  
22 JST *et al.*, 2014 U.S. Dist. LEXIS 161042, at \*8 (N.D. Cal. Nov. 16, 2014) (“A district court  
23 will only interfere with the lead plaintiff’s choice of counsel if that choice ‘is so irrational, or so  
24 tainted by self-dealing or conflict of interest, as to cast genuine and serious doubt on that  
25

1 plaintiff's willingness or ability to perform the functions of lead plaintiff.'" (quoting *In re*  
 2 *Cavanaugh*, 306 F.3d 726, 733 (9th Cir. 2002))).

3       Schlatre has selected Pomerantz as Lead Counsel for the Class. Pomerantz is a premier  
 4 firm, highly experienced in the areas of securities litigation and class action lawsuits, which has  
 5 successfully prosecuted numerous such actions on behalf of investors over its 80-plus year  
 6 history, as detailed in its firm resume. *See* Muehlbauer Decl., Ex. E. Pomerantz recently  
 7 secured a recovery of \$3 billion on behalf of investors in the securities of Petróleo Brasileiro  
 8 S.A. — Petrobras, the largest class action settlement in a decade and the largest settlement ever  
 9 in a class action involving a foreign issuer. *See id.* Petrobras is part of a long line of record-  
 10 setting recoveries led by Pomerantz, including the \$225 million settlement in *In re Comverse*  
 11 *Technology, Inc. Securities Litigation*, No. 06-CV-1825 (E.D.N.Y.), in June 2010. *Id.* Most  
 12 recently, Pomerantz announced as Lead Counsel on behalf of a class of Fiat Chrysler  
 13 Automobiles N.V. investors that it has reached a \$110 million settlement with the company.  
 14 *See id.*

15       Muehlbauer Law is well qualified to serve as Liaison Counsel in this Action. As its firm  
 16 resume reflects, Muehlbauer Law's principal office is in Las Vegas, Nevada, and the firm  
 17 specializes in securities class action matters, among other practice areas. *See id.*, Ex. F.  
 18 Muehlbauer Law has experience in achieving substantial recoveries in class actions, and its  
 19 attorneys have extensive familiarity with the Local Civil Rules of this Judicial District.

20       As a result of their extensive experience in litigation involving issues similar to those  
 21 raised in the instant Action, Schlatre's choice of counsel have the skill, knowledge, expertise,  
 22 resources, and experience that will enable them to prosecute the Action effectively and  
 23 expeditiously. The Court may be assured that by approving Schlatre's selection of Pomerantz  
 24

1 as Lead Counsel and Muehlbauer Law as Liaison Counsel, the Class members will receive the  
2 best legal representation available. Thus, Schlatre respectfully urges the Court to appoint  
3 Pomerantz and Muehlbauer Law to serve as Lead Counsel and Liaison Counsel, respectively,  
4 for the Class.

5  
6 **CONCLUSION**

7 For the foregoing reasons, Schlatre respectfully requests that the Court issue an Order:  
8 (1) appointing Schlatre as Lead Plaintiff for the Class; and (2) approving his selection of  
9 Pomerantz to serve as Lead Counsel and Muehlbauer Law as Liaison Counsel for the Class.

10 Dated: February 15, 2022  
11

12 **MUEHLBAUER LAW OFFICE, LTD.**

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25 *Counsel for Tad Schlatre and  
Proposed Lead Counsel for the Class*  
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27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on February 15, 2022, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

*/s/ Andrew R. Muehlbauer*

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Andrew R. Muehlbauer